

STEINHEIMER TRUST

IBLA 85-136

Decided June 25, 1985

Appeal from a letter-decision of the Nevada State Director, Bureau of Land Management, denying request to guarantee access across Federal lands involved in private exchange proposal N-32651.

Affirmed.

1. Exchanges of Land: Generally -- Federal Land Policy and Management Act of 1976: Exchanges -- Private Exchanges: Protests -- Rules of Practice: Appeals: Standing to Appeal -- Rules of Practice: Protests

Where BLM denies a protest to a proposed private land exchange, it must inform the protestant of its right to appeal. The right of appeal is not dependent upon BLM's determination of whether the protestant claims ownership of public lands in the proposal or holds a valid existing contract, permit or lease for those lands. Denial of a protest makes the protestant a "party to a case" within the meaning of 43 CFR 4.410. Whether a party to a case has an interest which has been adversely affected by the BLM decision is a matter to be decided by the Board of Land Appeals on appeal.

2. Federal Land Policy and Management Act of 1976: Private Exchanges: Protest

Where BLM denies a request by a private land owner for access across Federal lands selected in a private exchange proposal on the basis that historical access to the private lands has been across other private lands not associated with the exchange and that the requested access would provide no public benefit, such a determination will be upheld where the one seeking access fails to establish error in the BLM determination.

APPEARANCES: Richard W. Harris, Esq., Reno, Nevada, for appellant; Stewart R. Wilson, Esq., Elko, Nevada, for the Boyd Ranch, intervenor.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Steinheimer Trust (Steinheimer) appeals from an October 17, 1984, letter-decision of the Nevada State Director, Bureau of Land Management (BLM), denying Steinheimer's request that BLM guarantee a right of access to it across certain Federal lands involved in proposed private exchange N-32651.

On March 23, 1981, Boyd Ranch (Boyd) submitted an application to BLM proposing to exchange approximately 4,931 acres of private lands for 4,985 acres of land in Federal ownership, pursuant to section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982). BLM proceeded to process the exchange application, and in May 1984 it issued its Notice of Realty Action (NORA) notifying the public of the exchange proposal and inviting comments within 45 days of its publication in the Federal Register, which occurred on May 30, 1984. 49 FR 22548.

BLM received, on July 10, 1984, a comment from Steinheimer requesting that BLM guarantee access across selected Federal lands to the Steinheimer property in sec. 3, T. 34 N., R. 58 E., Mount Diablo Meridian. Steinheimer stated that if access were guaranteed it would not oppose the exchange. On October 17, 1984, the Nevada State Director informed Steinheimer that he was denying its request and proceeding with the exchange. In his letter the State Director stated:

Historical physical access to the parcel has been on land primarily from the east and south on existing roads crossing adjacent private lands not associated with the exchange.

Reservation of a public easement across the Federal selected lands would provide no benefit to the public since all lands in the area would be in private ownership once the exchange is consummated. Further, without the benefit of legal access across private lands to the beginning of the application area it would be inappropriate to encumber the public lands with an unusable property right.

Steinheimer filed a timely appeal from the denial. On January 22, 1985, Boyd filed a motion to intervene in the appeal which the Board granted by order dated January 25, 1985. Subsequently, Boyd filed a request that the Board expedite consideration of this appeal. By order of June 3, 1985, the Board granted that request.

[1] We will first examine a procedural question raised by this appeal. The October 17, 1984, letter-decision did not provide for the right-of-appeal. Nonetheless, Steinheimer filed an appeal within 30 days of receipt of that letter-decision. In a note to the file dated November 20, 1984, a BLM employee stated: "Our letter did not provide for a right of appeal since the protestant does not hold a valid existing contract, permit or lease for the public lands involved in the exchange proposal (BLM Manual H-2200-1, Step 9c)." The quoted part of the BLM Manual provides:

9c. If a comment is received from an adversely affected party who claims ownership to the public land in the [exchange] proposal; or holds a valid existing contract, permit, or lease

for the public land in the proposal; and the lands affected by the comment are not to be deleted from the proposal, advise the commentor of the 43 CFR Part 4 right of appeal to the Interior Board of Land Appeals.

The BLM Manual provides improper guidance regarding the granting of the right-of-appeal in a situation such as that presented in this case. The Board on a number of occasions has set forth the two separate and distinct prerequisites to prosecution of an appeal: (1) the appellant be a "party to a case" and (2) the appellant be "adversely affected" by the decision appealed from. National Wildlife Federation, 82 IBLA 303, 307 (1984); Oregon Natural Resources Council, 78 IBLA 124, 125 (1984); In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982); see 43 CFR 4.410. Denial of a protest makes a person a "party to a case." *Id.* ^{1/} In this case Steinheimer is a "party to a case" in that its comment or protest to the proposed exchange was rejected by the State Director. ^{2/} See National Wildlife Federation, *supra* at 307.

Mere rejection of the protest, however, does not necessarily establish that one is adversely affected. If an appeal is sought, an unsuccessful protestant must show that a legally recognizable "interest" has been adversely affected by the denial of the protest. *In re Pacific Coast Molybdenum Co.*, *supra* at 331. The determination of whether an unsuccessful protestant has such an interest and whether that interest, if shown, has been adversely affected is to be made by the Board, not by BLM.

In this case Steinheimer asserts ownership of private land which it claims will be landlocked because of BLM's refusal to guarantee it access across selected Federal lands. Steinheimer's allegations are sufficient to establish an interest which has been adversely affected by the State Director's determination. Thus, Steinheimer has standing to pursue this appeal.

[2] On appeal Steinheimer asserts that the Steinheimer family purchased a 280-acre parcel of land in Elko County, Nevada, in 1916 and over the years the property has been visited by members of the family and has been leased for grazing purposes to various cattle companies. Appellant submits a map which it claims depicts all the access ways to the property utilized over the years. It claims the significant roads giving access to the property are marked in yellow and that there are several existing roads to the north and west of its parcel (Statement of Reasons, Exh. A).

^{1/} 43 CFR 4.450-2 provides in pertinent part:

"[a]ny objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances."

^{2/} We do not mean to imply that all comments submitted in response to a NORA must be treated as protests. Clearly, in this case Steinheimer was objecting to completion of the exchange without reservation of access. The record (*i.e.*, the Nov. 20, 1984, note to the file) indicated BLM considered Steinheimer's request for access to be a protest to the exchange.

Through a historical pattern of use, appellant contends it has established a easement by prescription under Nevada law on the private lands adjacent to Federal land. Appellant does not further identify the location of this "easement" or "easements."

The State Director erred when he stated in his October 17, 1984, letter-decision that historical physical access to the land has been primarily from the east and south on existing roads crossing adjacent private land, appellant claims. To the contrary, appellant argues, exhibit A clearly depicts the roads giving access from the north.

Appellant further argues that the State Director acted improperly when he concluded that since Steinheimer had no right of legal access across private lands, it would be "inappropriate to encumber the public lands with an unusable property right." Appellant asserts that it has prescriptive easements which could be perfected in Nevada courts, and, thus, an access right across the lands to be exchanged would not be an unusable property right.

Besides protecting its access rights, reservation of an access right would, appellant claims, be a public benefit in that it would provide access for fire control, watershed access, mineral development, and other public activities. Finally, appellant complains that failure to guarantee access will have the result of inverse condemnation of valuable property rights.

Boyd disputes Steinheimer's claims of having established numerous access routes to its property through open, notorious, and adverse use of adjoining private property. Boyd provides evidence in the form of affidavits, maps, and photographs which it claims establishes that the roads entering the Steinheimer property from the north and west have not been used for decades and are generally impassable. We have examined the information submitted by Boyd and agree that it establishes that the only practical access to the Steinheimer land is from the south, and that such access will not be affected by the exchange proposal. 3/ Steinheimer has not come forward to rebut any of the submissions by Boyd.

3/ Boyd provides the affidavit of Jack H. Walther, a 65 year old lifetime resident of Lamoille Valley, who presently resides in that valley approximately 7 miles from the Steinheimer property. He stated:

"In the case of the Steinheimer property, I have worked cattle in the area for many years, but it is my recollection that the only regular access to the property since the 1930's has been from the south. This is the road which follows the ridge west of Lamoille Creek and passes through the old Leddeck place. This is the only decent road in the area. There are some other trails in the area but they would not provide reliable access to the Steinheimer property from a good road such as a county road."

Another resident of Lamoille Valley since 1932, Joe G. Zollitch, stated in his affidavit:

"I have been shown the map attached as Exhibit A to the Steinheimer appeal. Most of the 'roads' shown on the map in the vicinity of the Steinheimer property were never roads, but were actually wagon and livestock trails. The only actual road to the Steinheimer property which was generally

The State Director found no legal right of access across private lands to the beginning point of the requested access. While appellant claims a prescriptive easement, there is no evidence that it has obtained an order from a state court recognizing a prescriptive easement. Thus, the State Director was correct in observing that Steinheimer had no legal right of access to the beginning of the requested access. ^{4/}

Steinheimer's argument that aside from guaranteeing access to its property, a reservation across the selected Federal lands would be a public benefit is refuted by Boyd. Boyd observes that even assuming Steinheimer were landlocked, which Boyd argues it is not, access for mineral activity and fire control is not precluded by lack of a reservation. Boyd states that mining companies commonly gain access across private property by agreement, or under Nevada law such companies have the power of eminent domain. Further, Boyd points out that Nevada law grants fire control agencies a right of access across private property to control fires.

We have reviewed Steinheimer's contentions, none of which persuades us the State Director was wrong in denying Steinheimer's request for access across selected lands.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski Will A. Irwin
Administrative Judge

Administrative Judge

fn. 3 (continued)

useable was the road entering the property from the south. This road also passes through the Leddeck Ranch. Almost all of the other trails which might have given access to the Steinheimer property have either disappeared over the years from lack of use, or because they became unusable due to erosion, or agricultural improvements."

Likewise, Jack L. Boyd who has resided on the Boyd Ranch on Lower Lamoille Creek from 1937 to the present stated in his affidavit:

"The U.S. Geological Survey Halleck SW Quadrangle, 7.5 Minute Series (Topographic), published in 1971, clearly shows only one road entering the Steinheimer parcel, and this road enters the Steinheimer property from the south across lands owned by Frank and Phyllis Hooper, the lessees of the Steinheimer parcel. The consummation of the BLM Land Exchange N-32651 would not and could not adversely affect access to the Steinheimer parcel."

^{4/} In its argument Steinheimer mischaracterizes this finding by the State Director. It contends that the State Director found it had no legal access to its property. However, what the State Director held was that Steinheimer had no legal right of access across private lands to the beginning point of the requested access in sec. 16, T. 35 N., R. 58 E.

